

**Civil Procedure**  
**Winter Term 2026**

**Lecture Notes No. 9**

**VII. DISCOVERY**

**INTRODUCTION / OVERVIEW**

... pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable.

[\*Doucette \(Litigation Guardian of\) v. Wee Watch Day Care Systems Inc.\*, 2008 SCC 8 at para. 24 \(S.C.C.\)](#) per Binnie J.

Discovery is usually the most productive, most expensive, and most fought over stage in the civil litigation process.

In 2010, the Rules changed in substantial ways in respect of discovery:

- Introduction of the over-arching 'proportionality' principle and 'discovery plans';
- Changes to the standard of relevancy;
- Time limits on oral discovery (7 hours, except for simplified proceedings in respect of claims under \$100,000 per defendant under R.76 in which 2 hours is the limit).

These changes were made in the hope that discovery will be faster, cheaper, and more efficient in future. Time will tell if the reforms have the desired effect.

***The purposes of discovery:***

- Re-enforce your theory of the case;
- Understand your opponent's theory of the case;
- "Discover" where evidence may be available to support your case;

- Assess the quality and quantity of documentary evidence and testimony supporting each side, and what further investigation needs to be done;
- Predict impact of key witnesses for and against your case;
- Obtain admissions respecting facts not in dispute, the content and authenticity of documents, the existence of other documents – this helps to narrow the issues;
- Commit your opponent's witnesses to their evidence;
- Put yourself in a position to make or respond to a settlement offer, to mediate, and to attend a pre-trial hearing with a judge

**Note:** the *Civil Rules Review – Final Report* recommends the elimination of discovery *per se*. The amended Rules will provide for information exchange and, where appropriate, pre-trial examination.

## **STAGES**

### ***Discovery Plan (if ordered or counsel makes an agreement)***

#### **Rule 29.2**

...

29.1.3 (1) Where a party to an action intends to obtain evidence under any of the following Rules, **the parties to the action shall agree to a discovery plan in accordance with this rule:**

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions).

**(2) The discovery plan shall be agreed to before the earlier of,**

- (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and**
- (b) attempting to obtain the evidence.**

**(3) The discovery plan shall be in writing, and shall include,**

- (a) the intended scope of documentary discovery** under rule 30.02, taking into account relevance, costs and the importance and complexity

of the issues in the particular action;

**(b) dates for the service of each party's affidavit of documents** (Form 30A or 30B) under rule 30.03;

**(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;**

**(d) the names of persons intended to be produced for oral examination** for discovery under Rule 31 and information respecting the timing and length of the examinations; and

**(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.**

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference.

29.1.4 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3).

**29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.**

- The need for a 'discovery plan' was introduced in 2010. This directly relates to another important change – limiting the parties to 7 hours of oral examination, except with consent or leave (2 hours for simplified proceedings under R.76); see Rule 31.05.
- The problem in the past has been lengthy and expensive discoveries in simple cases which abused the system; the accent now is on 'proportionality'

### **Documentary Discovery**

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

## Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

...

## Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

## Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.

## Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

### ***Oral Examination for Discovery***

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

*Take a pragmatic approach:*

Effective discovery requires **preparation** and **planning**; don't waste your client's money and your time in proceeding to discovery before you can make the maximum use of the opportunities that you have.

**Understand the law** and what you, and the other side, have to prove to succeed.

**Be conscious of the costs of discovery** - prioritize, and construct a discovery plan that is proportionate to what is at stake in the litigation.

### ***How Do I Prepare Effectively?***

- Obtain and review the documents in your possession that are central to the litigation – understand how they figure in your case and the other side's case;
  - Seek admissions of authenticity;
  - Seek explanations if there is uncertainty;
  - Understand the 'factual matrix' in which the document was made if the case revolves around interpretation of the contracts;
  - Etc.
- Review the discovery documents.
- Plan your questioning in sections – this way you can read answers into the trial record and the keys answers will be in context:

- Plan to use both open-ended and directed questioning –
  - ‘Did you see anything out of the ordinary before the accident?’
  - ‘There was a red signal at the intersection. Is that correct?’
- Isolate key facts and issues to develop in the examination;
- As questions with precision if intended to garner an admission - below, an admission of failing to pass on a key document:
  - ‘You were the staff doctor on duty on May 11, 2012’?
  - ‘You were the staff doctor on duty on May 12, 2012’?
  - ‘It is standard practice for the staff doctor to be responsible for providing a surgeon with any available up-to-date pathology report before the scheduled surgery’?
  - ‘There were two pathologists reports made in respect of my client’?
  - ‘One pathology report was made on May 10?’ [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab A]
  - ‘A second and updated pathology report was made on May 11’? [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab B]
  - ‘You received the pathologist’s updated report dated May 11 on May 12, 2012 at approximately 12:30am?’
  - ‘You knew the operation was scheduled for May 12, 2012 at 5:00am?’
  - ‘You yourself did not provide the updated pathologist’s report to the surgeon before the scheduled surgery’?
  - ‘You yourself did not ask anyone to provide the updated pathologist’s report to the surgeon before the scheduled surgery’
- Ask open-ended questions to close sections:
  - ‘Do you know of anyone that provided the surgeon with the updated report?’
  - ‘Is it your belief that the surgeon had the updated report? Why?’

***Prepare your client for discovery:***

Suggested points to explain:

- It’s not in a courtroom, but in an office with a court reporter;
- Answer truthfully – lies will come back to haunt you ;

- Answer only the question asked;
- Ask for clarification if unsure of what is being asked;
- Talk slowly and clearly;
- Don't talk at the same time as your lawyer or the other lawyer;
- If given a document to review and answer question, read the document;
- Don't strive to impress, intimidate, or befriend the other lawyer.

### ***Understand Undertakings, 'Taken Under Advisement', and Refusals:***

#### ***Obligation:***

A person examined must answer *relevant* questions.

#### ***No answer, but an undertaking to answer:***

Giving an undertaking is (i) a promise to answer and (ii) an admission that the question is proper and relevant. A lawyer who undertakes to provide the answer at a later time must do so. An undertaking is a promise that can result in discipline if broken. Moreover, the Court may compel the answer to be given, take an adverse inference, etc – up to the lawyer or party in contempt.

#### ***No answer, 'Taken Under Advisement':***

This means 'we're not sure we know or we have to tell you but we'll get back to you'. If no answer is forthcoming in 60 days, it is deemed a refusal.

#### ***A refusal is just that –***

Counsel may refuse his or her witness to answer on the basis that the evidence sought is irrelevant, immaterial, inadmissible (e.g. privileged), or there is some other valid reason that makes the question improper. A 'refusal motion' is a motion under Rule 37 to compel the person examined to answer.

Lawyers use charts to track undertakings, under advisements, and refusals for themselves. On a refusals motion, one must prepare such a chart from the transcript.

▪ **Most Important – where do I sit?**

(Opposing party, if attending)

Examining Lawyer

Table

Reporter

Lawyer for Party Examined

Party Examined

FORM 37C

*Courts of Justice Act*

REFUSALS AND UNDERTAKINGS CHART

*(General heading)*

REFUSALS AND UNDERTAKINGS CHART

<b>REFUSALS</b>					
Refusals to answer questions on the examination of ....., dated .....					
Issue & relationship to pleadings or affidavit <i>(Group the questions by issues.)</i>	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
1.					
2.					
3.					

<b>UNDERTAKINGS</b>					
Outstanding undertakings given on the examination of ....., dated .....					
Issue & relationship to pleadings or affidavit <i>(Group the undertakings by issues.)</i>	Question No.	Page No.	Specific undertaking	Date answered or precise reason for not doing so	Disposition by the Court
1.					
2.					
3.					

*(Date)*

*(Name, address and telephone and fax numbers of the party filing the refusals and undertakings chart)*

## **2. PRIVILEGE**

The Latin *privus* finds its way into Middle English and then Old French and finally into the law as *privilege*, indicating a right or immunity or advantage. It usually occurs in a modified form in a particular area of law as a term of art. For us, *privilege* indicates a right not to disclose information or a document and, as a corollary, a rule that privileged information or documents are inadmissible in evidence unless the privilege admits of an exception, or is waived, or is terminated by the Court. In the context of discovery, this means that certain types of information or documents do not have to be produced to the other side notwithstanding relevance.

There are two types of privilege that warrant consideration:

**(a) Lawyer-Client Privilege (aka Solicitor-Client aka Legal Professional Privilege), which relates to:**

- (i) communications between lawyer and client;
- (ii) which entail the seeking or giving of legal advice; and
- (iii) which are intended to be confidential.

Such communications are not discoverable or admissible. If the privilege is waived, the communications are both discoverable and admissible (if relevant).

**(b) Litigation / Legal Professional Privilege relates to:**

- (i) communications between lawyer and client;
- (ii) generated for the dominant purpose of litigation.

The privilege attaches to any document that was prepared for the dominant purpose of litigation, regardless of intentions of confidentiality or the involvement of a lawyer. The privilege only is in respect of the litigation and the party's adversary.

[**Common interest privilege** is not a separate category of privilege. Rather, it extends privilege to third parties where there is a common interest in anticipated or commenced litigation or even some transactions.]

**Pritchard v. Ontario (Human Rights Commission)  
2004 SCC 31 (S.C.C.)**

A person made a complaint to the Ontario Human Rights Commission against her dismissal by her employer; the OHRC did not proceed with the complaint. In the course of judicial review and appeal, the complainant sought the advice given to the OHRC by its in-house lawyer. The opinion was privileged. The case sets out the rationale for the wide protection offered by the privilege and its applicability to in-house counsel.

Major J.:

**14** **Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function:** see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46.

**15** Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, as **"(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties."** Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, supra, at p. 834.

**16** **Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship.** The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), **the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established."** The scope of the privilege does not extend to communications **(1) where legal advice is not sought or offered, (2) where it is not intended to be confidential, or (3) that have the purpose of furthering unlawful conduct:** see *Solosky*, supra, at p. 835.

**17** As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2:

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

**18** In *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.), this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in McClure, supra:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis. [emphasis in original]

(Arbour J. in *Lavallee*, supra, at para. 36, citing Major J. in *McClure*, supra, at para. 35)

...

**21** Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

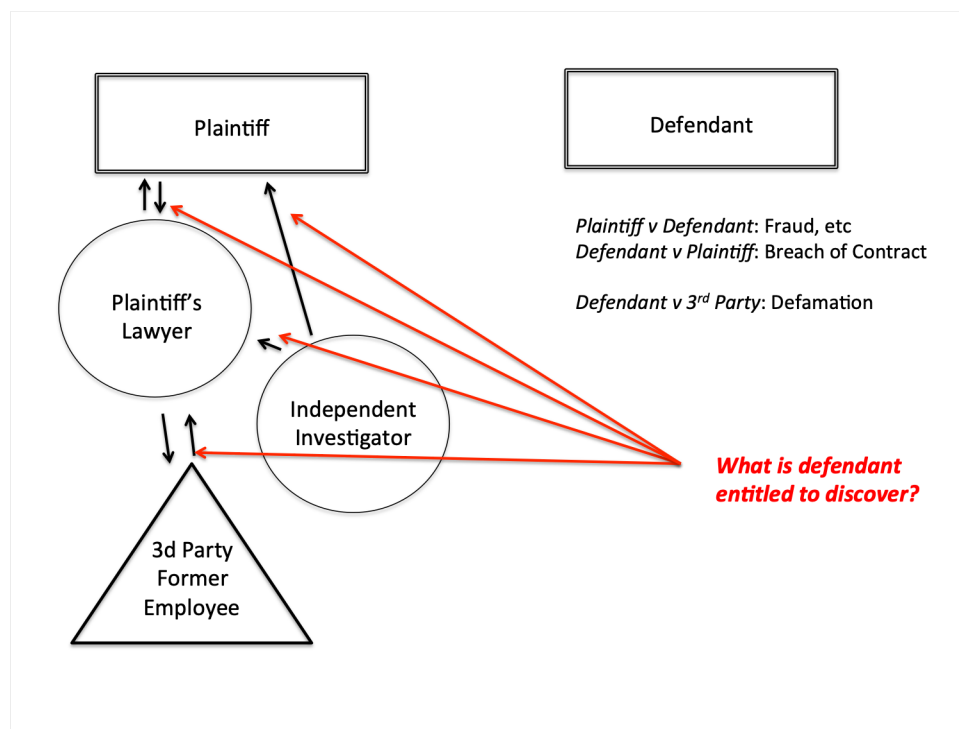
...

**28** The opinion provided to the Commission by staff counsel was a legal opinion. It was provided to the Commission by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege. The fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.

**29** There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify disclosure; nor is this Court prepared to create a new common law exception on these facts.

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**General Accident Assurance v. Chrusz  
(1999), 45 O.R. (3d) 321 (Ont. C.A.)**



This case considers the rationale and nature of solicitor-client and litigation privilege. It is also important in understanding when and how information can be discovered from third parties, and in what circumstances disclosure to third parties may result in the waiver of litigation privilege.

This was a dispute between an insurer (plaintiff) and a property owner (defendant, insured). The property, a hotel, was damaged by fire and the insurer initially suspected arson based on an independent investigator's report. Thereafter, the insurer seemingly accepted that it was liable to pay under the policy and advanced some funds to the insured. The extent of the insurer's liability had not yet been determined. A recently dismissed employee of the defendant then came forward and (i) produced a video that he made in respect of his allegations to the plaintiff's lawyer; (ii) produced copies of business records to the plaintiff's lawyer relating to the defendant's business; and (iii) made a statement to the plaintiff's lawyer, under oath, implicating the defendant in causing the fire and making falsely inflated claims under the policy. The plaintiff's lawyer provided a transcript of the sworn statement to the employee and his lawyer and kept a copy of the video and the records. The day after the statement was made, the insurer

brought an action in fraud and deceit against the insured to recover the money paid out. The defendant counterclaimed against the insurer under the policy, and, crossclaimed against the employee for defamation.

In its Affidavit of Documents, the plaintiff listed 'Note, blueprint, copies of photo, fax, drawing, report' and claimed privilege against a demand for discovery. At issue was the discoverability of the sworn statement, the video, the records, and the reports made by the independent adjuster to the plaintiff insurer.

**(a) Principles:**

***Lawyer-Client Privilege***

per Doherty J.A., dissenting, but in which Carthy and Rosenberg JJ.A. concurred:

88 **Client-solicitor privilege is the oldest and best established privilege in our law. It can be traced back some 400 years in English law...**

89 The criteria for the existence of client-solicitor privilege are well-established. In *Descôteaux c. Mierzewski* (1982), 70 C.C.C. (2d) 385 (S.C.C.) at 398, and again very recently in *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.) at 288, the Supreme Court of Canada adopted the following description of client-solicitor privilege by Wigmore (8 Wigmore, *Evidence*, § 2292, McNaughton Rev. 1961):

**Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.**

90 **The privilege extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant:** *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.) at 34; *Grant v. Downs* (1976), 135 C.L.R. 674 (Australia H.C.) at 686; R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 127-33. For example, even if Mr. Bourret's reports are privileged as a defendant by counter-claim, he may be examined for discovery on steps he, or others on his behalf, took to investigate the fire as well as on observations made and information gathered in the course of that investigation.

91 **The rationale underlying the privilege informs the perimeters of that privilege. It is often justified on the basis that without client-**

**solicitor privilege, clients and lawyers could not engage in the frank and full disclosure that is essential to giving and receiving effective legal advice. Even with the privilege in place, there is a natural reluctance to share the "bad parts" of one's story with another person.** Without the privilege, that reluctance would become a compulsion in many cases: *Anderson v. Bank of British Columbia* (1874), 2 Ch. D. 644 (Eng. C.A.) at 649; *Smith v. Jones* (1999), 22 C.R. (5th) 203 (S.C.C.) at 217, per Cory J.; J.W. Strong, ed., *McCormick on Evidence*, 4<sup>th</sup> ed. (St. Paul, Minn.: West Publishing Co. 1992), vol. 1 at 353.

92 While this utilitarian purpose is central to the existence of the privilege, its rationale goes beyond the promotion of absolute candor in discussions between a client and her lawyer. **The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences. Access to justice depends in part on the ability to obtain effective legal advice. The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice:** *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at 231-32, per Wilson J.; *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.) at 510; *Descôteaux c. Mierzwinski*, *supra*, at 413-14; *A. (L.L.) v. B. (A.)* (1995), 103 C.C.C. (3d) 92 (S.C.C.) at 107-8, per L'Heureux-Dubé J. (concurring); *R. v. Shirose*, *supra*, at 288; *Baker v. Campbell*, *supra*, at 118-20, per Deane J.

93 **The privilege also serves to promote the adversarial process as an effective and just means for resolving disputes within our society. In that process, the client looks to the skilled lawyer to champion her cause against that of her adversaries. The client justifiably demands the undivided loyalty of her lawyer.** Without client- solicitor privilege, the lawyer could not serve that role and provide that undivided loyalty. As the authors of *McCormick*, *supra*, write at pp. 316-17:

At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent

that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary . [Emphasis added.]

**94 In summary, I see the privilege as serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.**

### ***Litigation Privilege***

Per Cathy J.A. for the majority:

22 The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at p.653:

**As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation.** Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, **it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.** Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, (solicitor-client privilege), which has peculiar reference to the professional relationship between the two individuals. [Footnotes omitted.]

23 R. J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence* , L.S.U.C. Special

Lectures (Toronto: De Boo, 1984) at 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, **solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.** This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

### **Rationale for Litigation Privilege**

**Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect — the adversary process — among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.**

...

29 One historic precedent that in my view does have modern application but that has been given a varied reception in Ontario is the House of Lords' decision in **Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (U.K. H.L.)** . That case concerned a railway inspector's routine accident report. It was prepared in part to further railway safety and

in part for submission to the railway's solicitor for liability purposes. It was held that while the document was prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and thus it must be produced.

30 After considering authorities that had protected documents from production where one purpose of preparation was anticipated litigation, Lord Wilberforce concluded at pp. 1173 and 1174:

**It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it...**

...

It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose, would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly...

This dominant purpose test has contended in Canada with the substantial purpose test. Appellate courts in Nova Scotia, New Brunswick, British Columbia and Alberta have adopted the dominant purpose standard...

**31 In Ontario, the predominant view of judges and masters hearing motions is that the substantial purpose test should be applied. This, of course, provides a broader protection against discovery than the dominant purpose test and, in my view, runs against the grain of contemporary trends in discovery...**

...

### Common interest privilege

42 In some circumstances litigation privilege may be preserved even rise to this issue on the present appeal is the provision to Pilotte by the solicitor for the insurer of a copy of Pilotte's signed statement.

**43 While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.**

..

#### *(b) Application of the Principles*

	Majority	Dissent
Communications between the insurer and its lawyer	All are lawyer-client privileged	Agree.
Investigator's communications to insurer	The reports and communications up to the retainer of a lawyer in contemplation of litigation are not privileged and are discoverable. They do not satisfy the 'dominant purpose' test. The insurer and insured were not adversaries at this point.  Thereafter, litigation privilege attaches. Note that no solicitor-client privilege attaches; these are not privileged after termination of the litigation.	Agree. Also, as third party not a conduit of information between lawyer and insured, it is important to hold that no lawyer-client privilege attaches,

Sworn statement made by the former employee (original in the hands of the plaintiff's lawyer)	Made for the litigation and thus litigation privileged in the hands of the insurer, its lawyer, and its investigator.	Not privileged. Litigation privilege must be balanced against other societal interests and thus if the harm to the party seeking the information is more significant than the interests of the party seeking to maintain privileged, it can be limited. The defendant cannot
		get at this information which was very relevant otherwise. Moreover, it contains admissions by the third party employee which are admissible hearsay.
Sworn statement (copy)	Not privileged. No 'common interest' between plaintiff and third party employee, and, not made for the dominant purpose of the third party's litigation. Rather, provided to the third party employee for use as a witness at trial.	Not privileged. Given that the transcript should be produced by insurer, the copy is also discoverable.
'float book and additional time sheets'	Not made for the dominant purpose of the litigation and not privileged. Moreover, public documents are not privileged merely by being gathered together for the purposes of litigation.	A public document might be subject of litigation privilege and best to leave that question open.

Thus, at issue between the majority and dissent was less the application of litigation privilege than its limitation on a principled basis.

**Blank v. Canada (Minister of Justice)**  
**2006 SCC 39 (S.C.C.)**

In this case the SCC discussed the distinctions between litigation and lawyer-client privilege and held authoritatively that litigation privilege terminates with the litigation (construed broadly to include related litigation in the same cause]. The ‘dominant purpose’ test was endorsed. The question of privilege attaching to otherwise public documents was left open.

The facts involved a request for access to information respecting the prosecution of the applicant for *Fisheries Act* offences which were eventually stayed. The applicant brought an action against the government for the prosecution and sought the information to prove his allegations of improper prosecution. The Federal Court of Appeal held that the documents were discoverable given that the litigation had terminated and the SCC agreed.

Fish J.:

**34 The purpose of the litigation privilege, I repeat, is to create a “zone of privacy” in relation to pending or apprehended**

**litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have “terminated”, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.**

**35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield.**

Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case “on wits borrowed from the adversary”, to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege...

37 Thus, the principle “once privileged, always privileged”, so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended...

39 At a minimum, it seems to me, **this enlarged definition of “litigation” includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or “juridical source”). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.**

40 **As a matter of principle, the boundaries of this extended meaning of “litigation” are limited by the purpose for which litigation privilege is granted, namely, as mentioned, “the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate”...**

...

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a “branch” of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister’s claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

...

32 **Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel... A self-represented litigant is no less in need of, and therefore entitled to, a “zone” or “chamber” of privacy. Another important distinction leads to the same conclusion. Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege.** In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches

nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well...

60 **I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be**

**viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.** As Royer has noted, it is hardly surprising that modern legislation and case law

[TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

Or, as Carthy J.A. stated in *Chrusz*:

The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

**Airst v. Airst**  
**1998 CanLII 14647 (Ont. Sup. Ct.)**

Two lawyer-client privileged documents were inadvertently disclosed to a mutual expert. Was privilege lost? It was held that recent authority allowing a judge to determine the issue on a *voir dire* is preferable to older cases that would hold that privilege has been lost.

Wein J.:

**Case-law Relating to Waiver of the Privilege Upon Inadvertent Disclosure**

[9] **The traditional common law approach, as set out in the English Court of Appeal in *Calcraft v. Guest*, [1898] 1 Q.B. 759, [1895-9] All E.R. Rep. 346 (C.A.), has been that the privilege is lost whether the disclosure is by accident or by design.** This traditional approach has been adopted by the Supreme Court of Canada in *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 592.

[10] However, **in the civil context, in cases where the disclosure is found to be inadvertent, more recent authority in this court and other courts has held that, *Descôteaux notwithstanding*, there is a discretion that may be properly exercised in favour of non-disclosure where the release of the documents or information has been found to be inadvertent...**

[11] The competing policy interests are obvious. The basic rationale behind the solicitor-client privilege is to permit people to speak frankly and openly with their solicitors. Inadvertent disclosure should not logically override the privilege in all cases, though there may be some level of obligation upon the solicitor and the client to take steps to ensure that their communications remain confidential.

...

[14] The more recent trend in the authorities is to permit the courts to enquire into the circumstances by which the privileged information has come to the attention of the third party. Where a third party has obtained the information by improper means, courts have held that the privileged information ought not to be disclosed. On the other hand, Charter principles, applicable in criminal cases, may override traditional approaches to the law of privilege.

[15] In the criminal law context where Charter principles have

overlaid a rights-based matrix onto the development of law, it has been fully recognized that interpretations of privilege and the scope of a waiver may be affected by Charter-based rights. So for example in *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 at p. 431, 103 C.C.C. (3d) 1 at p. 15,

it was noted that: “it must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused’s right to make full answer and defence” (per Lamer C.J.C. and Sopinka J. dissenting on another point).

**[16] This principled approach to the law of evidence must clearly be given application in the civil law context: it has been acknowledged that the common law should develop in accordance with Charter principles and values, even though the Charter may not have direct application to the case: “ensuring that the common law of privilege develops in accordance with ‘Charter values’ requires that the existing rules be scrutinized to ensure that they reflect the values the Charter enshrines”...**

[17] In this context, that principle dictates that the rigid approach embodied in *Calcraft v. Guest*, supra, must be modified to reflect the fairness approach developed in more recent cases.

### **General Conclusions**

**[18] In balancing the competing interests in a case involving inadvertent disclosure, the court must exercise a discretion and determine the issue based on the particular circumstances. Factors relevant to the court’s consideration will include the way in which the documents came to be released, whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure and, sometimes, the timing of the application, the number and nature of the third parties who have become aware of the documents, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the court.**

[19] In some cases of inadvertent disclosure there may be a limited risk that the information has become or will become widely known beyond the party to whom the disclosure was made. The information may not even have been fully released, as in cases where documents are released but not opened or read. In other circumstances, the balance may favour admission of the evidence, such as where the documents have come into the hands of the opposing party through the carelessness of the party claiming privilege, but not through any wrongdoing of the opposing party.

In some such situations the failure to permit the introduction of the evidence could leave the party with a sense that the court was denying itself the opportunity to assess conflicting information on a material point, and consequently could negatively reflect on the public perception of the administration of justice. In other cases the information might have been so widely distributed that it would be futile as a practical matter to attempt to prevent its admission. In every case there must be a balancing of the relevant factors in the individual circumstances of the case, thus no hard rule can be laid down.

Findings in this Case

[20] **In this case, there is no issue that the disclosure was inadvertent. A review of the documents confirms that solicitor-client privilege would apply to all of the content of the documents. Notwithstanding that the content may in some way be relevant to the issues before the court, in my view the equities favour the holding that the privilege has not been lost in this case. The release of the documents was entirely inadvertent, apparently through the carelessness of a party of advanced years required to find documents relating to many years of transactions. The disclosure was limited in scope and restricted to one individual retained in a capacity that may be broadly construed as confidential. There has been no “public” disclosure of the documents. The content of the documents does not**

**bear in any direct way on the third party’s assessment of the material he was retained to review. The court’s ability to assess the facts underlying the issues in the case will not be impaired by lack of disclosure.** To the contrary, release of the solicitor-client instructions might well be seen, in this case, as giving the opposing party an unfair “windfall” advantage of revealing tactical approaches taken at one point in time by the other side. Given the timing of the discovery of the issue, well after both parties had testified, disclosure at this time is additionally problematic. All of these factors are relevant to my consideration.

[21] Accordingly, in this case the letters will not be released to counsel for the wife. The court copies of the letters will remain sealed and are not to be opened without further court order.

**White v. 123627 Canada Inc.  
2014 ONSC 2682 (Ont. S.C.J.)**

When should counsel who has been provided with privileged documents inadvertently be removed as counsel of record?

**Ellies J.:**

[10] Our law has long protected documents created for the purpose of litigation from disclosure to opposing parties during the course of that litigation. Litigation privilege is based upon the need for a “protected area” within which to facilitate investigation in the preparation of a case for trial by the advocate, free from adversarial interference and without fear of premature disclosure: *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319, at paras. 27-28, adopting the academic writings of Sharpe J.A. in “Claiming Privilege in the Discovery Process,” *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65.

[11] Allowing a litigant to fully investigate the facts surrounding a matter free from fear that the results will be disclosed unnecessarily benefits our adversarial system of justice in a number of ways. Among them is the early resolution of claims which, once fully investigated, may not warrant a trial. Where matters are not resolved, the truth-finding function of the trial is facilitated by the degree to which the parties have been free to prepare within the protected area of litigation privilege.

**[12] Where a privileged document finds its way to an opposing party, unfairness is often the result. The shield behind which the information contained in the document came into being may be turned into a sword in the hands of an opponent. The more often that is allowed to occur without court intervention, the more often the incentive**

**will arise not to properly investigate a matter, or to improperly hide the results of it. For that reason, courts should not easily sweep away the protection afforded by litigation privilege and should, where necessary, take steps to enforce it, including removing opposing counsel who have inadvertently been granted access to privileged documents.**

**[13] Where inadvertent disclosure has occurred, as it has in this case, there arises a tension between the need to fortify the protection granted to documents prepared for the purpose of litigation and the right of the “innocent” party to counsel of choice. In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 (CanLII), [2006] 2 S.C.R. 189, a case in which solicitor-client privileged**

documents fell into the wrong hands, Binnie J. highlighted (at para. 56) the right of a plaintiff to continue to be represented by counsel of choice as an important element of our adversarial system of litigation, holding “that if a remedy short of removing the ... solicitors will cure the problem, it should be considered.” Binnie J. set out a number of factors to be considered in determining whether counsel should be removed as a result of a breach of solicitor-client privilege (para. 59). These factors include:

- (1) the manner in which the documents came into possession of the party or its counsel;
- (2) what the party and his counsel did upon recognition that the documents were potentially privileged;
- (3) the extent of any review made of the privileged material;
- (4) the contents of the privileged documents and the degree to which they are prejudicial;
- (5) the stage to which the litigation has progressed; and
- (6) the potential effectiveness of precautionary steps taken to avoid the effect of the breach of the privilege.

Applying the test, the lawyer in this case was removed principally on the basis of prejudice to the party on who behalf inadvertent disclosure was made of a confidential interview.

**It is a convention of practice to extend the professional courtesy of not reading privileged documents inadvertently produced to you by your opponent and to return them at once.**

## **2. DOCUMENTARY DISCOVERY**

### **Warman v. Wilkins-Fournier 2011 ONSC 3023 (Ont. S.C.J.)**

This is an interesting illustration of the discovery rules in relation to production of e-records necessary for the plaintiff to identify and serve Statements of Claim on two anonymous parties that allegedly libelled him through comments made on a political web-site. Please read for the context.

### **Frangione v. Vandongen 2010 ONSC 2823 (Ont. S.C.J.)**

Here the defendant sued by the plaintiff who allegedly received catastrophic injuries rendering him unemployable was successful in obtaining e-discovery of a number of computer records, including his Facebook account.

Master Pope:

**[34] It is now beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action. Brown J. in *Leduc, supra*, at paragraph 23, cited numerous cases in which photographs of parties posted to their Facebook profiles were admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff put enjoyment of life or ability to work in issue.**

**[35] It is also good law that a court can infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile. (*Murphy, supra; Leduc, supra* at para. 36)**

[36] The Facebook productions made to date by the plaintiff are admittedly relevant to the issues in this action. Thus I can safely infer having reviewed the photographs of the plaintiff interacting with presumably friends at a wedding and other public places, as well as his communications with friends, that it is likely his privately-accessed Facebook site contains similar relevant documents. Although it is possible that the contents of his Facebook site may be used by the defendant to impeach the plaintiff's credibility, I am satisfied based on my review of the plaintiff's productions to date that its primary use will be to assess his damages for loss of enjoyment of life and his ability to work.

...

**[40] The plaintiff argues that from a proportionality standpoint, given the abundance of medical evidence regarding the plaintiff's injuries, the plaintiff's computer documents are unnecessary and irrelevant. I would be extremely hesitant to exclude a body of evidence such as computer documents including photographs and communications such as are typically found on a person's Facebook site merely because there is another more**

credible body of evidence such as medical reports that will be called into evidence at trial on the same issue. Firstly, this motion is not brought at the trial stage – it is still in the discovery stage. Secondly, despite a production order made at the discovery stage, a trial judge will ultimately decide the relevancy of a document at a time when all of the evidence is before the court.

[41] For the reasons above, the plaintiff shall preserve all material on his Facebook website until further order of this court and produce all material contained on his Facebook website including any postings, correspondence and photographs up to and including the date this order is made.

### **3. EXAMINATION FOR DISCOVERY**

**29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,**

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;**
- (b) the expense associated with answering the question or producing the document would be unjustified;**
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;**
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and**
- (e) the information or the document is readily available to the party requesting it from another source.**

...

**31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,**

- (a) the information sought is evidence;**
- (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or**
- (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.**

**Ontario v. Rothmans Inc.**  
**2011 ONSC 2504 (Ont. S.C.J.)**  
 (“Proportionality”)

Here Justice Perrell reviewed the law on examinations for discovery and cross-examinations generally and held:

[120] In J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Toronto: NexisLexis, 2010), at p. 487 I describe the purposes of an examination for discovery as follows:

The examinations for discovery provide an opportunity to define the issues that are contested and uncontested and to move forward in the proof or disproof of contested facts. In *Modriski v. Arnold*, [1947] O.J. No. 132 (C.A.), the Court of Appeal stated that the purposes of production and discovery are: (1) to enable the examining party to know the case he or she has to meet; (2) to enable the examining party to obtain admissions that will dispense with formal proof of his or her case; and (3) to obtain admissions that will undermine the opponent’s case.

In *Ontario Bean Producers Marketing Bd. v. W.G. Thompson & Sons* (1982), 1982 CanLII 2084 (ON SC), 35 O.R. (2d) 711 (Div. Ct.), the Divisional Court elaborated and extended the various aims of discovery. The Court noted the following purposes for examinations for discovery: (1) to enable the examining party to know the case he or she has to meet; (2) to procure admissions to enable a party to dispense with formal proof; (3) to procure admissions which may destroy an opponent’s case; (4) to facilitate settlement, pre-trial procedure, and trials; (5) to eliminate or narrow issues; and (6) to avoid surprise at trial.

...

**[129] The case law has developed the following principles about the scope of the questioning on an examination for discovery:**

- **The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings: *Playfair v. Cormack* (1913), 4 O.W.N. 817 (H.C.J.).**
- **The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or speculative discovery is known colloquially as a “fishing expedition” and it is not permitted. See *Cominco Ltd. v. Westinghouse Can. Ltd.* (1979),**

1979 CanLII 489 (BC CA), 11 B.C.L.R. 142 (C.A.); Allarco Broadcasting Ltd. v. Duke (1981), 1981 CanLII 723 (BC SC), 26 C.P.C. 13 (B.C.S.C.).

- Under the former case law, where the rules provided for questions “relating to any matter in issue,” the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy... The recently amended rule changes “relating to any matter in issue” to “relevant to any matter in issue,” which suggests a modest narrowing of the scope of examinations for discovery.

- The extent of discovery is not unlimited, and in controlling its process and to avoid discovery from being oppressive and uncontrollable, the court may keep discovery within reasonable and efficient bounds: Graydon v. Graydon (1921), 67 D.L.R. 116 (Ont. S.C.) at pp. 118 and 119 per Justice Middleton (“Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture ...”); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.) at p. 246; Ontario (Attorney General) v. Ballard Estate (1995), 1995 CanLII 3509 (ON CA), 26 O.R. (3d) 39 (C.A.) at p. 48 (“The discovery process must also be kept within reasonable bounds.”); 671122 Ontario Ltd. v. Canadian Tire Corp., [1996] O.J. No. 2539 (Gen. Div.) at paras. 8-9; Caputo v. Imperial Tobacco Ltd., [2003] O.J. No. 2269 (S.C.J.). The court has the power to restrict an examination for discovery that is onerous or abusive: Andersen v. St. Jude Medical Inc., [2007] O.J. No. 5383 (Master).

- The witness on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue: Van Horn v. Verrall (1911), 3 O.W.N. 439 (H.C.J.); Rubinoff v. Newton, 1966 CanLII 198 (ON SC), [1967] 1 O.R. 402 (H.C.J.); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.).

- The witness on an examination for discovery may be questioned about the party’s position on questions of law: Six Nations of the Grand River Indian Band v. Canada (Attorney General) (2000), 2000 CanLII 26988 (ON SCDC), 48 O.R. (3d) 377 (S.C.J.).

...

[159] The proportionality principle is a manifestation of the policy of frugality that led to the introduction of the simplified procedure to the Rules of Civil Procedure. To use a metaphor, the normal Rules of Civil Procedure are the Cadillac of procedure, an expensive vehicle with all the accessories. However, not all actions or applications require such an

expensive vehicle, and a Chevrolet, a serviceable, no frills vehicle, will do just fine for many cases, and it will provide access to justice and judicial economy.

[160] Proportionality is a parsimonious principle. In *Javitz v. BMO Nesbitt Burns Inc.*, 2011 ONSC 1322 at para. 28, Justice Pepall noted that the proportionality principle was introduced because the system of justice was under severe strain because cases were taking too long and costing too much for litigants. In the passage quoted by the Master from Chapter 5 of Lord Woolf's report, Lord Woolf said that his overall aim was to "improve access to justice by reducing the inequities, cost, delay, and complexity of civil litigation." In *Abrams v. Abrams*, 2010 ONSC 1928 at para. 70, Justice D.M. Brown, stated: "Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits."

**Noble v. York University Foundation**  
**2010 ONSC 399 (Ont. S.C.J.)**  
 ('relevance')

**Master Muir:**

14 In deciding the issues on this motion I have applied the relevance test set out in Rule 31.06(1), as amended effective January 1, 2010. This test replaces the "semblance of relevance" test previously applicable to motions such as this. While the examinations of Marsden and Marcus took place in May, 2008 and this motion was scheduled in December, 2009, it was not heard until January 15, 2010 after the Rules amendments came into force. The January 1, 2010 Rules amendments do not contain any transition provisions relating to the change from "semblance of relevance" to "relevance". Consequently, it is my view that the "relevance" test is applicable to this motion. This is also the view taken by Justice Belobaba in *Onex Corp. v. American Home*, [2009] O.J. No. 5526 (Ont. S.C.J.) in relation to the Rules amendments dealing with summary judgment.

15 In applying the relevance test I am mindful of the comments found in the *Summary of Findings and Recommendations of the Civil Justice Reform Project* led by the Honourable Coulter A. Osborne, upon which the January 1, 2010 Rules amendments are based. In particular I note the comments at part 8 of the Report dealing with discovery:

I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with

**due regard to cost and efficiency." In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.**

**This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process.** Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.

**Ornstein v. Starr**  
**2011 ONSC 4220 (Ont. S.C.J.)**  
 ('evidence', proportionality)

A child (plaintiff) needed surgery on a finger; a surgeon operated on the wrong finger. Shortly before the scheduled oral examination of the surgeon, counsel for the surgeon and hospital (defendants) admitted that the standard of care was breached by the surgeon and that this caused a second surgery. The defendants refused to put forward its witnesses for discovery on the question of damages. The surgeon appeared but would not answer questions.

**Master Short:**

*Seven Words of Discovery*

1. Q: Please state your full name for the record  
 A: Joseph Auby Starr.
2. Q: And you are a doctor?  
 A: I am.
3. Q: And do you have a specialty?  
 A: Plastic surgery.
4. Q: And how long have you been carrying on as a plastic surgeon?

Counsel: Don't answer that.

23 In my years in practice I do not believe I ever encountered an outright refusal to produce *any* witness for discovery. In this case counsel for North York sent a letter by facsimile on January 20, 2011, in response to an email confirming that he intended to proceed with the scheduled discovery of a representative of the Hospital:

*Given the admissions contained in Ms. Findlay's letter dated January 19, we are unable to conceive any questions relevant to the remaining issues in this action that necessitate the discovery of the Hospital Representative.*

*Unless you are able to provide us specific, relevant issues that the Hospital Representative can reasonably be expected to have knowledge of, we will not be producing the Hospital Representative for discovery on January 24, 2011.*

24 In response, by email sent at 4:54 PM the same afternoon, Mr. Linden advised that the Plaintiffs required questions to be answered with respect to causation and damages alone. In the plaintiff's factum the following position is asserted:

*6. The Plaintiffs are under no obligation to provide the defendants with a list of questions to be asked at discovery nor is the Plaintiff required to convince the Defendant of the relevance of any line of questioning prior to an examination for discovery. Simply because counsel for the Defendant could not "conceive any questions relevant to the remaining issues in this action" does not mean that such questions do not exist.*

25 This seems a reasonable position in the circumstances of this case. I see no reason to refuse discovery while elements of causation and damages remain at large.

...

35 I accept the view of plaintiff's counsel set out in the written submissions before me:

*16. It would be prejudicial to the Plaintiffs' to be forced to put all of their questions on the record when it is clear that they would all be objected to as the Defendant could then prepare answers to those questions with counsel in advance of the discovery.*

*17. The Plaintiffs' should not be barred from asking questions relating to the issue of damages simply because that same question could be interpreted to also go to the issue of liability/the standard of care.*

*18. In this case, Dr. Starr's observations and the observations of the attendant nurse relating to the condition of Sophie's hand might simultaneously go to damages and liability but this does not mean the Defendants can refuse to answer the questions. Some overlap is unavoidable and the same overlap will not prejudice the Defendants as they have already admitted a breach in the standard of care.*

36 It is difficult to understand why both defendants have taken such a resistant position in a case where there appears to be no cogent reason for not admitting the liability apparently already acknowledged *ab initio* in the physician's dictated Day Surgery Report.

...

70 When all is said and done my goal is to promote a fair and just system. If patients are proven to have been harmed as a result of negligent medical care (or it is admitted that this is the case) fairness must dictate that timely arrangements be made to compensate those patients in an appropriate and timely manner. I cannot imagine that any defendant would attempt to rag the puck in an attempt to exhaust the injured party's finances or spirit. Certainly such an approach would not accord in any way with my view of fairness.

71 Fairness and justice dictate the clear need for timely resolution of medico-legal matters. Regardless of the circumstances, medico-legal matters are stressful for all involved: physicians, other health care providers, patients and their families. I fail to see how the apparent tactics and strategy adopted in this case, "actively promote measures that respect the right to procedural fairness and encourage the timely resolution of such matters."

72 It has not been demonstrated to me that this approach could possibly "improve accessibility to justice and reduce the stress experienced by physicians and their patients."

73 After warning the defendant that the examination would be aborted and resort to a motion if the Doctor did not answer proper questions, his counsel continued to refuse to allow him to answer proper questions. The following exchange occurred between questions 14 and 19:

14. Q. In any event, Dr. Starr, when did you first meet the plaintiff, Sophie Ornstein?

Mr. Sutton: Don't answer that. Anything relating to care has been admitted.

15. Mr. Linden: Well, I haven't asked about care yet. I am going to ask about his observations of the condition of her hand before he performed the surgery.

Mr. Sutton: Don't answer that.

16. Okay. Let's just go off the record.

17. Mr. Linden: I am going to ask three more if you object to all of them, we are just going to stop, just go to court, and we will have a court order your client to answer questions he is supposed to.

Mr. Sutton: No. You can put the questions on the record and establish the relevance ...

18. Mr. Linden: No. I am going to ask three more questions.

Mr. Sutton: No. You can establish the relevance of your questions. If your question is relevant, I will allow him to answer. You haven't established the relevance of your question.

19. Mr. Linden: we are going to try three more and then we will call it a day.

Mr. Sutton: That is your choice.

20. Q. Sir, when did you first meet Sophie Ornstein?

Mr. Sutton: Don't answer that.

21. Q. Did you examine her hands at the time when you met her?

Mr. Sutton: Don't answer that

22. Q. Did you made any observations of the condition of her fingers when you first examined her?

Mr. Sutton: Don't answer that

Mr. Linden: Okay. That is enough.

74 In my view it is indeed enough. Enough to justify making the order sought with costs on a substantial indemnity basis, payable forthwith.

#### **4. DISCOVERY OF NON-PARTIES**

##### **Hopkins v. Robert Green Equipment Sales Ltd. 2018 ONSC 998 (Ont. S.C.J. - Master)**

**Master Muir:**

[after reviewing a number of decisions respecting third party examination for discovery]

**[6] The principles set out in these decisions can be summarized as follows:**

- **the requirements of Rule 31.10 are cumulative and a party seeking such relief must satisfy both Rule 31.10(1) as well as each of the requirements in Rule 31.10(2);**
- **there must be good reason to believe that the non-party has information relevant to a material issue;**
- **before being entitled to an examination of a non-party, the moving party must establish that he has been unable to obtain the**

information he seeks from the other parties to the action as well as from the non-party he wishes to examine;

- there must be a refusal, actual or constructive, to obtain the information from the other parties to the action, and the non-party, before the moving party will be able to meet the onus under Rule 31.10(2)(a); and,
- if that onus is met the court may then look to Rule 1.04 to determine whether the court's discretion, as set out in Rule 31.10(1), should be exercised on the facts of each particular case.

**Ontario (Attorney General) v. Ballard Estate  
(1995), 1995 CanLII 3509 (Ont. C.A.)**

This is a case involving a demand by beneficiaries for documents from the estate trustees; the trustees resisted.

**Per Curiam:**

In making the fairness assessment required by rule 30.10(1) (b), the motion judge must be guided by the policy underlying the discovery régime presently operating in Ontario. That régime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non- parties is not per se unfair.

**The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.**

The motion judge was properly concerned about the ramifications of a production order in this case. Many litigants, especially those involved in complex commercial cases, find themselves in the position where non-party financial institutions are in possession of documents which are relevant to material issues in the litigation, and which those institutions cannot, or will not, voluntarily produce prior to trial. If this situation alone is enough to compel production during the discovery stage of the process, then production from and discovery of non-parties would become a

routine part of the discovery process in complex commercial cases. It may be that it should be part of that process, but that is not the policy reflected in the rules as presently drafted.

In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

- the importance of the documents in the litigation;
- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
- whether the discovery of the documents with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
- the position of the non-parties with respect to production;
- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

In addressing these and any other relevant factors (some of which were identified by the motion judge in his reasons), the motion judge will bear in mind that the appellants bear the burden of showing that it would be unfair to make them proceed to trial without production of the documents.

**In our opinion, a consideration of some of these factors will require an examination of the documents as contemplated by rule 30.10(3). That rule provides in part:**

***30.10(3) . . . where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.***

**For example, in considering whether it would be unfair to require the appellants to wait until trial to obtain the documents, the number, content and authorship of the documents may be very important. Those facts could be ascertained only from an examination of the documents or perhaps from an examination of an appropriate summary prepared by those in possession of the documents. Similarly, the importance or unimportance of the documents in the litigation may best be determined by an examination of them.**

**We recognize that this process will be time consuming and will place an additional burden on the motion judge. We are satisfied, however, that in the**

**circumstances of this case and considering the material filed on the motions, that an informed decision requires an examination of the documents. A decision made without reference to the documents runs the very real risk of being either over- or under-inclusive. No doubt, as the case management judge, the motion judge will have a familiarity with the case which will facilitate his review of the documents.**

In the result, the appeal is allowed, the order made by the motion judge is set aside, and the matter is remitted to the motion judge for further consideration in accordance with the principles outlined above. The costs of this appeal and of the motion below are left to the motion judge.

## **5. THE DEEMED UNDERTAKING RULE**

Unless information obtained on discovery is made public in a hearing, or subject of consent, or where the Court so allows, it cannot be used for any other purpose:

30.1.01.(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

### **Kitchenham v. AXA Insurance Canada 2008 ONCA 877 (Ont. C.A.)**

The plaintiff was injured in a car accident. She sued (i) the other driver in tort, and (ii) her insurer who refused her disability benefits arising from injuries sustained in the accident. In the course of the tort action, the plaintiff was required to undergo a medical examination. She was provided a copy of that report as part of disclosure. Also, the defendant in the tort action filmed the plaintiff surreptitiously. The plaintiff was provided with a copy of the tape as part of disclosure.

The defendant in the second action sought production of the report and the tape as part of discovery. The plaintiff refused arguing that the deemed undertaking rule prevented her from producing the report and the videotape. Ultimately the Court of Appeal held that the deemed undertaking rule applied to bar the production of the items but allowed the proceedings to continue in respect of R.30.01(8) [‘f satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.’.]

Doherty J.A.:

#### **(i) Who is Subject to the Deemed Undertaking?**

...

26 An undertaking is a promise given by one party to another party to the lawsuit in exchange for obtaining something from that party. Thus, **in the discovery process, one party receives information from another party, and in exchange promises the other party that the information will not be used for any purpose other than the litigation at hand. The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining the disclosure to the party giving the disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure.** It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.

27 ... the rationale underlying the Rule, the language used in the Rule, and the jurisprudence of this court interpreting the Rule, all support an interpretation that is consistent with the way in which undertakings customarily work.

#### **(a) Rationale underlying the Rule**

28 Rule 30.1 came into force on April 1, 1996: O. Reg. 61/96, s. 2. It is a direct descendant of the common law implied undertaking doctrine recognized by this court in *Goodman v. Rossi*. The implied undertaking was recently described in these terms:

One such safeguard is the implied undertaking of confidentiality, which circumscribes the use that a party receiving discovery may make of the information it obtains. *Where the implied undertaking exists, the party in receipt of information is deemed to give an undertaking to the court that it will not use that information for any collateral or ulterior purpose unrelated to the litigation at hand.* [Emphasis added.]

Cristiano Papile, "The Implied Undertaking Revisited" (2006) 32 *Advocates' Q.* 190, at p. 190.

29 **The common law implied undertaking, as developed in Canada and England, limits the use that the recipient of the compelled disclosure could make of information obtained by that disclosure. The implied undertaking did not bind either the party who provided the disclosure or strangers to the litigation in which the disclosure was made...**

**30** The implied undertaking promotes the due administration of justice in the conduct of civil litigation in two ways. First, it encourages full and frank disclosure on discovery by the parties. It does so by interdicting, except with the court's permission, the subsequent use of the disclosed material by the party obtaining that disclosure for any purpose outside of the litigation in which the disclosure was made. Second, the implied undertaking accepts that the privacy interests of litigants must, subject to legitimate privilege claims, yield to the disclosure obligation within the litigation, but that those interests should be protected in respect of matters other than the litigation: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, at paras. 23-27; Richard B. Swan, "The Deemed Undertaking: A Fixture of Civil Litigation in Ontario" (Winter 2008) 27 *Advocates' Soc. J.*, No. 3, p. 16.

...

**37** Two other features of the Rule demonstrate that it applies exclusively to the party or parties who obtain the evidence on discovery. Subrule (4) excludes from the deemed undertaking provision in subrule (3) a use "to which the person who disclosed the evidence consents". An outright exclusion from the deemed undertaking rule based on the unilateral consent of the disclosing party makes sense only if the Rule exists exclusively to protect the residual privacy interest of that party in the information it revealed on discovery. An exclusion from the deemed undertaking based on the disclosing party's consent is inconsistent with an interpretation of the Rule that makes the disclosing party subject to the undertaking. On that reading, one subrule would make the disclosing party subject to the deemed undertaking, while another subrule would allow the disclosing party to escape the deemed undertaking, simply by consenting to the subsequent use. One can hardly be said to be bound by an undertaking if one's own consent can negate that undertaking.

**38** Subrule (8) also assists in identifying the nature of the deemed undertaking rule. It provides that the court may order that the deemed undertaking in subrule (3) does not apply to evidence, or information obtained from it, "if satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence". Subrule (8) makes it clear that the party who disclosed the evidence through the compelled discovery process is the exclusive beneficiary of the protection afforded by the deemed undertaking. It is that party's privacy interests that can justify restriction on the use of information obtained through discovery outside of the litigation in which that information was obtained: see *B.E. Chandler Co. v. Mor-Flo Industries Inc.* (1996), 30 O.R. (3d) 139 (Ont. Gen. Div.), at p. 142.

...

**(ii) Did the Plaintiff Obtain a Copy of the Videotape and the IME Through the Discovery Process?**

**47** The tort defendant conducted surveillance of the plaintiff and recorded that surveillance by way of videotape. A copy of that videotape was produced to the plaintiff on discovery. The plaintiff clearly obtained a copy of the videotape during discovery. The fact that she is the subject of that videotape is irrelevant. The plaintiff is bound by the deemed undertaking not to use the videotape except as permitted by the Rule. The tort defendant, and not the plaintiff, is the beneficiary of that deemed undertaking. The deemed undertaking protects any privacy interest the tort defendant may have in the use of a copy of the videotape outside of the tort action.

**48** Similarly, the plaintiff obtained the IME during discovery in that it was produced to her by the tort defendant pursuant to Rule 33. As with the copy of the videotape, the plaintiff is bound by the deemed undertaking not to use the IME in another proceeding and the tort defendant is the beneficiary of that undertaking.

...

**(iii) Does the Deemed Undertaking Prohibit Production of Evidence on Discovery in a Subsequent Proceeding?**

**52** Subrule (3) proscribes use of evidence or information covered by the Rule "for any purposes other than those of the proceeding in which the evidence was obtained." The prohibition is drawn in very wide terms. Those terms are consistent with the scope of the common law implied undertaking that prohibited use for any purpose other than the conduct of the litigation in which the compelled disclosure occurred: *Goodman v. Rossi*, at pp. 374-75. The privacy rationale underlying the Rule also warrants extending the protection of the Rule to requests for disclosure of the information covered by the Rule in the course of discoveries in subsequent proceedings. Disclosure on discovery compromises the residual privacy interest of the party from whom the material was obtained by compelled disclosure in the earlier proceeding.

**(iv) The Operation of Subrule (8).**

**56** Having concluded that the copy of the videotape and the IME were obtained by the plaintiff in the course of discovery in the tort action, and that their disclosure on discovery by the plaintiff in the subsequent benefits action would constitute a use of that evidence, it follows that the material is subject to the deemed undertaking created by the Rule. None of the exceptions enumerated in subrules (4) to (7) apply. AXA can obtain the material either by getting the consent of the tort defendant to the plaintiff giving the material to AXA, or by obtaining an order under subrule (8) lifting

the deemed undertaking as it applies to the copy of the videotape and the IME.

**57 Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.**

**58 The interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking. My reading of subrule (8) is consistent with an interpretation of the Rule that recognizes the party who gave up the information as the sole beneficiary of the protection afforded by the Rule. It is also consistent with subrule (4), which provides that the deemed undertaking has no application if the party who disclosed the evidence consents to its use.**

**Martin v Toronto Police Services Board  
2023 ONSC 6191 (Ont. S.C.J.)**

Associate Justice L. La Horey:

[1] The plaintiffs and defendants bring competing motions with respect to the deemed undertaking rule. The plaintiffs David Martin and his mother Nancy Martin bring this action against the Toronto police in connection with Mr. Martin's arrest for break and enter. The criminal charges against Mr. Martin were dismissed after a preliminary hearing. The plaintiffs allege various wrongdoing against the police officers involved including negligent investigation, malicious prosecution and an unlawful search of the plaintiffs' residence.

[2] The plaintiffs brought a motion for an order that the deemed undertaking rule does not apply and that the plaintiffs can utilize certain discovery evidence to pursue their existing complaint to the Office of the Independent Police Director ("OIPRD") and a contemplated criminal proceeding – a private criminal prosecution against two police officers who are not named defendants.

...

[61] In my opinion, this is one of those exceptional circumstances in which

the interest of justice, in this case police accountability, outweighs the prejudice to the defendants such that I exercise my discretion to grant leave to the plaintiffs to use the Show Cause Brief (in its redacted form) in the OIPRD complaint and the prospective private prosecution.

[62] The defendants rely on the Longo case, where Justice Lococo decided that the interest of justice in the investigation into potential criminal conduct by the security guards and police did not outweigh the interests protected by the deemed undertaking rule. Longo is distinguishable from the case at bar in respect of the nature of the evidence in issue. In Longo the evidence was a private security video. In this case the evidence is a document that was prepared by a police officer in the course of his public duties, that was subject to potential disclosure by the Crown to Mr. Martin and is also available to the plaintiffs pursuant to an FOI request.

[63] The nature of the evidence in this case, in respect of which leave is sought, is such that the prejudice to the defendants is diminished.

[64] The defendants submit that in this balancing exercise, I should take into account that the plaintiffs have already breached the deemed undertaking rule. In my view, this does not tip the scales in the defendants' favour but remains part of the consideration on costs.

## **6. MEDICAL EXAMINATION**

Obviously a court-ordered medical examination is a very intrusive investigatory obligation. Usually the medical examination is of the plaintiff in tort actions on the question of damages; sometimes the examination may relate to cause of injuries or even the need for a litigation guardian if a party lacks mental capacity. In most cases the arrangements are made on consent. Where a subsequent examination is sought, often there is a dispute requiring the party seeking discovery to bring a motion.

### **Courts of Justice Act**

105.(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

**(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.**

(4) The court may, on motion, order further physical or mental examinations.

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

### **Rule 33**

**33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.**

33.02 (1) An order under section 105 of the Courts of Justice Act may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.

...

33.04 (2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

...

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

...

**Lovegrove v Rosenthal**  
**[1997] O.J. No. 5408 (Ont. Gen. Div.)**

The plaintiff sued for damages arising from a car accident. The nature of the harm was, inter alia, to her gastrointestinal system. The defendants sought an extremely intrusive independent medical examination of the plaintiff (seemingly to put pressure on the plaintiff to settle):

**(1) Documentation of the frequency and volume of diarrhea under controlled conditions.** The confounding effects of prescribed drugs, non prescribed substances such as laxatives, food and drink which may induce or worsen diarrhea in this patient need to be eliminated by observation and laboratory testing. It is also important **to observe the stool output while the patient is fasted for 24 hours**, which can provide causes to the cause of the diarrhea. **These observations must be done with the patient's consent in an in-hospital, supervised setting.**

**(2) Tests to determine the cause of the diarrhea. As described above, biochemical testing of stool to rule out laxative use is mandatory. The patient would also require a SeCHAT test, which involves the ingestion of a radiolabelled bile salt analog, and measurement of its retention by the body three days afterwards.** A normal study would rule out significant bile malabsorption as a cause of the diarrhea. If preliminary tests on the stool shows evidence of stool fact, a 72 hour quantitative stool collection for fat content with a test meal would be done to rule out fat malabsorption. These would also be done in a supervised setting, over 3-5 days. A possible structural lesion such as a small bowel stricture would mandate a barium X ray (small bowel follow through) for detection. The patient would also require a colonoscopy to rule out mucosal disease (structuring or inflammation). These are best done as an outpatient, as the requisite bowel preparation would interfere with the other inpatient studies described above.

**(3) An assessment of the anorectal region for incontinence with a manometry study. If abnormal, further studies could be done to rule out structural damage to the anal sphincter.** This could be done as an outpatient or inpatient without disrupting the testing described above.

**Kennedy J.:**

25           The uses for which the purported IME in Hamilton postulated by the defendants in this case in my view are suspect.

26           I have some difficulty accepting the position that the defendants would like to assist the plaintiff in providing her with the benefit of definitive investigation.

27 The tests themselves are duplicitous in nature. A colonoscopy has already been performed and the results are available to the defendants.

28 Dr. Bovell's conclusion is that he suggested investigations which include the anorectal motility study are not vital to making the diagnosis.

29 The problem that the plaintiff is having with respect to bile re-absorption relates to the loss of the last two feet of the ileum which was removed with surgery following the accident. There is no doubt that the plaintiff is having a problem with re-absorption. The SECHAT test involves the ingestion of a radioactive material to which the plaintiff protests. The results of the tests can only establish the obvious. There is no good reason to expose the plaintiff to this procedure. The test is inappropriate in the circumstances. This case is distinguishable on the facts from the ruling in *Carroll v. Wagg* (1996), 6 C.P.C. (4th) 351 (Ont. Master), released August 16, 1996.

**30 The court should not permit invasive tests to confirm what is obvious as part of an IME.**

**31 The hospital confinement would appear to be a form of forced confinement also in the guise of cross-examination. I cannot understand why the defence medical experts would not be satisfied with the plaintiff's report on the frequency of her bowel movement along with the reports to others offered in the extensive medical brief and future care reports which have been served by the plaintiff on the defendants. In my view the concerns of the plaintiff offered in opposition to the defendants' proposal are real and genuine. The proposed tests are indeed humiliating, painful and embarrassing. Travel and confinement associated with such an endeavour is tremendously inconvenient, unnecessary and unlikely to reveal any relevant information to the defence which is not already available.**